NO. 84-1945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL JOSEPH GALUSZKA,

Appellant

versus

JEANNE NELSON SCHWAB,
FOR AND ON BEHALF OF THE
MINOR, BRIAN PAUL SCHWAB,

Appellee.

On Appeal From the Louisiana Supreme Court and
the Louisiana Court of Appeal
for the Fourth Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Article 209A of the Louisiana Civil Code, which provides that a child not entitled to legitimate filiation or filiated by the initiative of the parent must prove filiation as to an alleged living parent by "a preponderance of the evidence", violates the due process requirements of the Constitution of the United States.

LIST OF PARTIES TO PROCEEDINGS BELOW

Appellee Below:

Jeanne Nelson Schwab, for and on behalf of the minor, Brian Paul Schwab.

Appellant Below:

Paul Joseph Galuszka.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

PAUL JOSEPH GALUSZKA,

Appellant

versus

JEANNE NELSON SCHWAB,
FOR AND ON BEHALF OF THE
MINOR, BRIAN PAUL SCHWAB,

Appellee.

ON APPEAL FROM THE LOUISIANA
SUPREME COURT AND THE LOUISIANA COURT
OF APPEAL FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant Paul Joseph Galuszka appeals from the order of the Louisiana Supreme Court entered March 15, 1985, denying Appellant's application for Writ of Certiorari and/or Review, and from the judgment of the Louisiana Court of Appeal for the Fourth Circuit entered January 11, 1985, affirming the judgment of the Louisiana Civil District Court for the Parish of Orleans entered January 6, 1984, which adopted the recommendations of the commissioner and judge ad hoc and decreed that Appellant is the father of the minor child, Brian Paul Schwab.

OPINIONS BELOW

The report of the commissioner and judge ad hoc of the Louisiana Civil District Court for the Parish of Orleans, and the judgment of the Louisiana Civil District Court for the Parish of Orleans, which appear in Appendices A and B hereto, *infra*, are not reported. The opinion of the Louisiana Court of Appeal for the Fourth Circuit, which appears in Appendix C hereto, *infra*, is reported at 463 So.2d 737 (1985). The denial by the Louisiana Supreme Court of Appellant's application for Writ of Certiorari and/or Review, which appears in Appendix D hereto, *infra*, is reported at 464 So.2d 1386 (1985).

JURISDICTION

The report of the commissioner and judge ad hoc of the Louisiana Civil District Court for the Parish of Orleans, which report recommended that Paul Joseph Galuszka be adjudged the father of the minor child, Brian Paul Schwab, was rendered on July 14, 1983. See Appendix A, *infra*. The judgment of the Louisiana Civil District Court for the Parish of Orleans decreeing that Paul Joseph Galuszka is the father of Brian Paul Schwab was rendered on January 6, 1984. See Appendix B, *infra*. The opinion of the Louisiana Court of Appeal for the Fourth Circuit, affirming the judgment of the Civil District Court for the Parish of Orleans, was issued on January 11, 1985. See Appendix C, *infra*. The Louisiana Supreme Court denied Paul Joseph Galuszka's application for Writ of Certiorari and/or Review on March 15, 1985. See Appendix D, *infra*.

The commissioner and the courts in the proceedings below applied Article 209A of the Louisiana Civil Code, which calls for a "preponderance of the evidence" standard of proof

in actions to prove filiation as to an alleged living parent, even though Appellant consistently contended that any provision providing for a standard less than clear and convincing evidence in such an action is subject to Constitutional challenge.

This appeal is being docketed in this Court within 90 days from the Louisiana Supreme Court's denial of the application below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Notice of this appeal was filed in the Louisiana Supreme Court, the Louisiana Court of Appeal for the Fourth Circuit, and the Civil District Court for the Parish of Orleans, on May 14, 1985. See Appendix E, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Article 209A of the Louisiana Civil Code provides:

> A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.

STATEMENT OF THE CASE

This case concerns the constitutionality of Article 209A of the Louisiana Civil Code, which provides that a child not entitled to legitimate filiation or filiated by the initiative of the parent must prove filiation as to an alleged living parent by a "preponderance of the evidence".

Article 209 was enacted as part of the Revised Civil Code of 1870. As originally enacted, Article 209 provided that proof of paternal descent might be made: (1) by private writings in which the father had acknowledged the child as his child, or had called him so; (2) when the father, either in public or in private, had acknowledged the child as his child, or had called him so in conversation, or had caused him to be educated as such; or (3) when the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived.

Article 209 was amended and reenacted by Louisiana Acts 1980, No. 549, effective July 23, 1980. Subdivision 4 of that Article, as amended, provided that "[a] child of a man may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the child of that man."

Article 209 was further amended by Louisiana Acts 1981, No. 720, effective September 11, 1981. Subdivision A of the Article as amended provided that: "A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article."

In 1982, Article 209 was again amended by Act No. 527, effective September 10, 1982. As amended, subdivision A of Article 209 provides that filiation must be proven "as to an alleged living parent by a preponderance of the evidence", while subdivision B of Article 209 provides that where an alleged parent is deceased, filiation must be proven by "clear and convincing evidence". Article 209A as amended in 1982 was applied to Appellant Paul Joseph Galuszka in the instant case.

The instant case arose during 1981 when Jeanne Nelson Schwab (hereinafter "Schwab"), filed suit for and on behalf of Brian Paul Schwab (hereinafter "Brian"), alleging that Brian was the biological son of Schwab and Paul Joseph Galuszka (hereinafter "Galuszka"), and asking the trial court to recognize the paternity of Galuszka and to order child support. Schwab's suit was filed in the Louisiana Civil District Court for the Parish of Orleans. Schwab's original Petition alleged relevant sexual relations with Galuszka on two dates, June 4, 1980, and June 12, 1980. Brian was born on March 8, 1981. Galuszka filed a general denial on November 18, 1981.

Subsequently, Schwab filed pleadings for the appointment of an expert to conduct blood tests of Galuszka. Although

Galuszka opposed Schwab's attempts to compel him to take the tests, his efforts were unsuccessful, and he ultimately underwent testing by Schwab's expert. The findings of the expert were that the possibility of paternity was only 91.7%, significantly lower than the 97+% possible under the testing procedure employed by the expert.

On June 8, 1982, Judge Henry Roberts of the Civil District Court transferred Schwab's suit to John Holohan, a commissioner and judge ad hoc.

Schwab then sought to compel Galuszka to submit to additional blood tests. Galuszka declined to undergo the additional tests, however. On the basis of this decline, Schwab moved for a summary judgment on the issue of paternity. That motion was denied.

The case was tried on the merits before the commissioner on May 9 and 10, 1983. Only the issue of paternity was heard; the support issue was deferred. In a report issued on July 14, 1983, Commissioner Holohan recommended that Galuszka be adjudged the father of Brian. On January 6, 1984, the Civil District Court, per Judge Roberts, adopted the recommendation of Commissioner Holohan and rendered a judgment which decreed that Galuszka is the father of Brian. On January 11, 1985, the Louisiana Court of Appeal for the Fourth Circuit (composed of Judges Jim Garrison, Denis Barry, and Robert Lobrano) affirmed the judgment of the Civil District Court. On March 15, 1985, the Louisiana Supreme Court denied Galuszka's application for Writ of Certiorari and/or Review.

At all stages of this case, Galuszka has contended that even if the standard of proof to be applied were preponderance of the evidence, Schwab has failed to prove that

Galuszka is the biological father of Brian. However, Galuszka has also consistently contended that a standard greater than preponderance of the evidence must be applied. Concerning this, Galuszka has argued that the version of Civil Code Article 209 to be applied is the version that was in effect when Brian was conceived, *i.e.*, before the amendments to the Article which expressly referred to "preponderance of the evidence" became effective.

Galuszka has also consistently challenged the constitutionality of Article 209, as amended. Thus, he has maintained that if interpreted literally, Article 209A as amended is unconstitutional. He has also asserted that Article 209A as amended must, for Constitutional reasons, be construed to require proof by "clear and convincing" evidence. Hence, the Memorandum of Law on Behalf of Paul Joseph Galuszka, filed with Commissioner Holohan on June 13, 1983, stated, at pp. 10-11, that:

> The possible consequences to a named defendant in a paternity suit are such that any provision allowing for a standard of proof less than clear and convincing is certainly subject to Constitutional challenge. Schatkin, *Disputed Paternity Proceedings*, Revised Edition (1980). Not only is the defendant required to support the child for up to 18 years, the child becomes his forced heir. Additionally, and importantly, the defendant, once found to be the father of the child, is then subject to criminal prosecution for non-support. L.R.S. 14:74. To allow a person to be subjected to criminal charges, or the possibility of being subjected to such charges, requires that the

> elements of proof be shown by a standard greatly in excess of a simple preponderance of the evidence. Unless and until the Legislature dictates that a finding of paternity does not subject a person to the otherwise applicable criminal statutes, the trier of fact in the civil proceedings to determine paternity must be held accountable to a higher standard of proof. If, in fact, the *sine qua non* for bringing a criminal action against a putative father, that is the proof of paternity, is ruled upon by the civil courts, the issue of paternity becomes *res judicata* and that decision could presumably be introduced in a subsequent criminal action to establish the fact of paternity in those proceedings. Arguably, then, plaintiff's burden of proof in this action should be beyond a reasonable doubt. There is no doubt, however, that it is greater than a simple preponderance.

Furthermore, in the same Memorandum, at p. 13, Galuszka asserted that:

> . . . "preponderance of the evidence" has not been defined in relation to Civil Code Article 209, and must, for Constitutional reasons, be interpreted as requiring proof of *facts* sufficient to show by a clear and convincing standard that filiation has been proven. To use any lesser a standard, is to possibly subject a defendant to criminal statutes premised on the finding of filiation in a civil suit wherein the standard of proof was less than that otherwise required for use in criminal proceedings.

Galuszka made the same arguments as those quoted above to the Civil District Court for the Parish of Orleans, the Louisiana Court of Appeal for the Fourth Circuit, and the Louisiana Supreme Court. Memorandum in Support of Exceptions to the Report of the Commissioner, filed in the Civil District Court on October 21, 1983, pp. 11-12, and 13-14; Original Brief on Behalf of Appellant Paul Joseph Galuszka, filed in the Court of Appeal on May 23, 1984, pp. 16-17, and 18; Application of Paul Joseph Galuszka for Writ of Certiorari, or Review, filed in the Louisiana Supreme Court in February, 1985, pp. 17 and 19.

Commissioner Holohan did not address Galuszka's arguments concerning standard of proof. In his report, the commissioner simply noted that "when the issue of paternity is weighed by the Court, . . . ordinary standards of evidence - preponderance of the evidence - are applied." Report of the Commissioner, and Judge Ad Hoc, Appendix A, *infra*. In its judgment, the Civil District Court merely adopted the recommendations of the Commissioner. Although observing that it had read the record and heard the evidence and arguments urged, the court did not actually discuss the arguments made by Galuszka.

The Louisiana Court of Appeal made no mention of Galuszka's assertion that "any provision allowing for a standard of proof less than clear and convincing [evidence] is certainly subject to Constitutional Challenge." However, the Court of Appeal did take up Galuszka's contention that the applicable codal provisions should be those in effect at the time Brian was conceived. The court held that "the applicable law governing the burden of proof is as set forth in the applicable articles as of the date of trial", *i.e.*, May 9 and 10, 1983, and that "it was proper for the lower court to apply the provisions of Article 209, as amended, in disposing of this case." Judgment of the Court of Appeal,

463 So.2d 739-740. The Court of Appeal also rejected Galuszka's argument that Article 209 as amended should not be interpreted literally, declaring that "Civil Code Article 209 is clear. It states '. . . by a preponderance of the evidence in a civil proceeding. . .' "; the court further observed that in any event, "the burden of proof both before and after the . . . amendments to the Civil Code is by a preponderance of the evidence." Judgment of the Court of Appeal, 463 So.2d 740. The court added that: "The scales of justice stand out evenly in a paternity action and the plaintiff bears the burden by a preponderance as in any other civil proceeding." *Id.*

The Louisiana Supreme Court denied without comment Galuszka's application for Writ of Certiorari and/or Review.

Schwab also failed to respond directly to the Constitutional issues raised by Galuszka in the proceedings below. Although acknowledging that Galuszka had put forth the proposition that the father of a child is subject to criminal charges for non-support, Schwab maintained that it was not necessary to consider this proposition because no criminal charges had as yet been filed against Galuszka. Original Brief on Behalf of Appellee, Jeanne Nelson Schwab, for and on Behalf of the Minor, Brian Paul Schwab, filed in the Court of Appeal on July 18, 1984, p. 6.

In summary, Galuszka has at all stages of this case maintained that for Constitutional reasons, a standard greater than preponderance of the evidence must be applied in determining whether he is Brian's father, and that any provision allowing for a preponderance of the evidence standard is subject to Constitutional challenge. Although the commissioner and the courts in the proceedings below did not discuss the Constitutional issues raised by Galuszka,

they have applied Article 209A of the Civil Code as amended and have held that preponderance of the evidence is the applicable standard of proof. In so ruling, the commissioner and the courts have necessarily upheld the validity of Article 209A.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented to this Court is whether Article 209A of the Civil Code of Louisiana violates the due process requirements of the Constitution of the United States insofar as this Article provides that filiation may be proven as to an alleged living parent by "a preponderance of the evidence". This question is so substantial that it requires plenary consideration, with briefs on the merits and oral argument, for its resolution. What is at stake here is the recognition by society that a parent-child relationship exists. The question of whether a man is the father of a child is extremely important, and the consequences of a determination of paternity are far-reaching.

In the proceedings below, Galuszka consistently contended that the possible consequences in a paternity suit are such that any provision allowing for a standard of proof less than clear and convincing is subject to Constitutional challenge. However, the lower courts disregarded Galuszka's contention. Indeed, the Louisiana Court of Appeal for the Fourth Circuit indicated that an action to establish paternity should be regarded as an ordinary civil suit. Thus, the court observed that "in a paternity action. . . the plaintiff bears the burden by a preponderance *as in any other civil proceeding*." 463 So.2d 740. (Emphasis added.)

It is Galuszka's position that an action to establish filiation or paternity should not be viewed "as any other civil

proceeding", and that the standard of proof ordinarily applied to civil suits is not an appropriate standard to be applied to paternity suits. Rather, Galuszka maintains that as a matter of due process the standard of proof to be applied to such suits must be greater than a mere preponderance of the evidence. There is ample support for his contention.

In *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18 (1976), this Court identified three factors to be considered in determining whether due process demands that "additional" or "substitute" procedural safeguards be adopted:

> . . . First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. . . .

An analysis of each of these factors in relation to an action to establish paternity compels the conclusion that a standard greater than preponderance of the evidence must be applied to such an action.

Initially, it is manifest that the private interests of any defendant in a paternity suit are vitally affected by a determination that the defendant is the father of a child. This is certainly true here, too. Thus, if the judgment decreeing that Galuszka is the father of Brian is allowed to stand, Brian

will under Louisiana law become Galuszka's forced heir, and, as such, will have a legal right to share in Galuszka's estate. Articles 1493 and 1495 of the Louisiana Civil Code. Galuszka will also have a duty to support Brian; indeed, Brian will have a right to claim support from Galuszka's heirs in the event of Galuszka's death. Articles 240 and 241 of the Civil Code. Furthermore, Galuszka will be subject to criminal prosecution for non-support, and if convicted, to a fine or imprisonment. La. R.S. 14:74. The entitlement to support and heirship which will be established by a judgment that Galuszka is the father of Brian, as well as the possibility that criminal prosecution leading to incarceration may ensue following such a judgment, mandate that a standard greater than preponderance of the evidence be applied to the suit against Galuszka.

The private interests of the child are also vitally affected by a proceeding to prove filiation or paternity. Hence, in *Salas v. Cortez*, 24 Cal. 3d 22, 154 Cal. Rptr. 529, 593 P.2d 226, 234, certiorari denied, 444 U.S. 900, 100 S.Ct. 209, 62 L. Ed. 2d 136 (1979), the California Supreme Court stated that:

> . . . In a sense, it is the child's identity that is litigated in a proceeding to determine parentage. Any determination that a particular individual is a child's biological father may have profound sociological and psychological ramifications. Further, the child's rights of support and inheritance against the father are at issue, as well as his or her future obligation to support the father. "If the child is to have anything, it must have a *right* to have his paternity ascertained in a fair and efficient manner." It is in the

> child's interest not only to have it adjudicated that *some* man is his or her father and thus liable for support, but to have some assurance that the correct person has been so identified. (Citations omitted and emphasis in original.)

This Court has also recognized that the private interests at stake in a paternity suit are considerable. Hence, in *Little v. Streater*, 452 U.S. 1, 13, 101 S.Ct. 2202, 2209, 68 L.Ed. 2d 627 (1981), wherein this Court held that a Connecticut statute which provided that in paternity actions the costs of blood grouping tests was to be borne by the party requesting them violated the Due Process Clause of the Fourteenth Amendment when applied to deny such tests to indigent defendants, this Court declared that:

> The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. See *Stanley v. Illinois*, 405 U.S. 645, 651-652, 92 S.Ct. 1208, 1212-13, 31 L.Ed.2d 551 (1972). Just as the termination of such bonds demands procedural fairness, see *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), so too does their imposition. Through the judicial process, the State properly endeavors to identify the father of a child

> born out of wedlock and to make him responsible for the child's maintenance. Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.

Application of a standard greater than preponderance of the evidence to paternity suits is also justified by a consideration of the second factor which this Court has said should be used in determining the requirements of due process, namely, the risk of an erroneous deprivation of private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Employment of a preponderance standard in actions to prove paternity involves a substantial risk of error; use of a standard greater than preponderance will significantly reduce that risk. Hence, in *Minnich v. Rivera*, No. 1435 of 1983, slip op. at pp. 8-9 (Court of Common Pleas of Lancaster County, Pennsylvania, Domestic Relations Division, October 19, 1984), appeal pending, the court noted that:

> . . . In paternity hearings, numerous factors combine to increase the risk of erroneous factfinding. In these trials, the testimony of a party is often of questionable reliability, and there are seldom accurate or reliable eyewitnesses. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and may reduce the chance that an erroneous determination will occur. . . . To require a clear and convincing standard is. . . a better procedure for safeguarding against erroneous determinations of paternity.

(A copy of the opinion in *Minnich v. Rivera* appears in Appendix F hereto, *infra*.)

In addition, this Court has acknowledged that "proof of paternity. . . . is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses." *Mills v. Habluetzel*, 456 U.S. 91, 97, 102 S.Ct. 1549, 1554, 71 L.Ed.2d 770 (1982). In these circumstances, application of a standard greater than preponderance of the evidence is required in order to safeguard against erroneous determinations of paternity.

Moreover, application of a standard greater than preponderance of the evidence to paternity suits comports with the third factor to be considered in deciding whether due process requires that additional or substitute procedural safeguards be adopted, that is, the Government's interest, and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. It is clearly in the interest of the State of Louisiana that the determination arrived at in an action to establish filiation be correct. Since the use of a standard greater than preponderance of the evidence would decrease the likelihood of erroneous determinations of paternity, adoption of such a standard would definitely promote the State's interests. Clearly, adoption of a standard greater than preponderance of the evidence in paternity suits would not entail increased fiscal and administrative burdens for the State of Louisiana. No additional financial costs would result from the imposition of a standard greater than preponderance of the evidence. In fact, imposition of such a standard may well serve to lessen the State's burdens, since, as one court has noted, "a correct determination of paternity increases the chance that the adjudged parent will comply with support obligations." *Corra v. Coll*, 305 Pa. Super. 179, 451 A.2d 480,

488 (1982). Furthermore, Louisiana courts and attorneys are thoroughly familiar with standards of proof greater than the preponderance standard in cases arising in the context of parent-child relationships. Under Article 209B of the Louisiana Civil Code, the clear and convincing standard is applied to actions to establish filiation where the alleged parent is deceased. In addition, La. R.S. 13:1603 provides for proof beyond a reasonable doubt and proof by clear and convincing evidence in cases involving the *termination of parental rights*. Consequently, application of a standard of proof greater than preponderance of the evidence in actions to *establish* filiation where the alleged parent is living would be fully in accord with these provisions.[1]

This Court has not previously decided whether statutory or codal provisions which provide for a preponderance standard of proof in paternity suits violate the due process requirements of the Constitution of the United States. However, this Court has held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Santosky v. Kramer*, 455 U.S. 745, 747-748, 102 S.Ct. 1388, 1391-1392, 71 L.Ed.2d 599 (1982). In *Santosky*, this Court determined that where, under New York law, the State of New York was empowered to terminate the parent-child relationship upon a finding that the child was "permanently neglected", and a New York statute required that

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1 **We submit that there should be no distinction between the standard of proof applicable to proceedings to create a parent-child relationship and the standard of proof applied in proceedings to terminate such a relationship. Neither should there be a distinction between the standard applied to actions to establish filiation where the alleged parent is living and the standard applied where the alleged parent is deceased.**

only a "fair preponderance of the evidence" support that finding, the statute violated the Due Process Clause of the Fourteenth Amendment.[2]

If a judgment which *terminates* a parent-child relationship must be based on more than a preponderance of the evidence, the same should be true concerning a judgment that establishes that a parent-child relationship exists. The creation of a parent-child relationship is no less significant than the termination of such a relationship. *Little v. Streater, supra*. Accordingly, this Court should hold that due process requires that a judgment of paternity be supported by at least clear and convincing evidence, and that Article 209A of the Louisiana Civil Code violates the Due Process Clause of the Fourteenth Amendment.

This Court has also noted that application of a standard of proof greater than preponderance of the evidence is appropriate where the interests at stake "are deemed to be more substantial than mere loss of money", or where such a standard is necessary "to protect particularly important individual interests". *Addington v. Texas*, 441 U.S. 418, 424, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979). The case at bar falls within both of these categories, and therefore, a standard greater than preponderance of the evidence should

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2 In *Santosky v. Kramer, supra*, this Court was concerned with a state-initiated proceeding to terminate a parent-child relationship. However, the reasoning expressed therein should be fully applicable to proceedings brought by private parties pursuant to state-sanctioned procedures and standards. "It is. . . appropriate, even essential, that, when expounding the Constitution, we be alert to situations in which a government, by sanctioning activities by a private party that it is forbidden to do directly, undermines the 'constitutive' function of the document." *Franz v. United States*, 707 F.2d 582, 594, n.45 (D.C. Cir. 1983).

be employed in this case.

Finally, we note that the instant case provides this Court with an opportunity to resolve a conflict among the highest courts of different states as to the standard of proof to be applied in actions to establish paternity or filiation. There is authority holding that paternity may be established by a preponderance of the evidence. *See, e.g., Isaacson v. Obendorf*, 99 Idaho 304, 581 P.2d 350, 354 (1978), and *Huntingdon v. Crowley*, 64 Cal. 2d 647, 51 Cal. Rptr. 254, 414 P.2d 382, 386 (1966). But this position is not unanimous. Thus, in the *Matter of Dorn "HH" v. Lawrence "II"*, 31 N.Y. 2d 154, 335 N.Y. S.2d 274, 286 N.E. 2d 717, 719, n.4 (1972), appeal dismissed *sub nomine Fuchs v. Silvester*, 409 U.S. 1121, 93 S.Ct. 945, 35 L.Ed.2d 254 (1973), the court observed that evidence of paternity must be more than preponderant and must, indeed, convince to the point of entire satisfaction. Moreover, in *Wake County ex rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E.2d 95, 99 (1982), certiorari denied, 459 U.S. 1113, 103 S.Ct. 745, 74 L.Ed.2d 965 (1983), the court noted that in a civil paternity suit, paternity must be proved beyond a reasonable doubt.

State courts have also reached different results in determining the requirements of due process in relation to the standard of proof in paternity suits. In the *Interest of J.A.K.*, 624 S.W.2d 355 (Tex. App. 1981), the court declined to hold that due process demands a higher standard of proof than preponderance of the evidence in an action to prove paternity. However, in *Minnich v. Rivera, supra,* the court determined that the due process requirements of the United States Constitution "mandate that a determination of paternity be made using a clear and convincing standard of proof, rather than a mere preponderance of the evidence standard." See Appendix F hereto, *infra*.

In view of the differing positions which the courts have taken concerning the degree of proof required to establish filiation or paternity, it is most appropriate that this Court decide the question presented in this case.

In summary, it is evident that Article 209A of the Civil Code of Louisiana violates the due process requirements of the Constitution of the United States. Due process demands that a standard greater than preponderance of the evidence be applied to actions to prove filiation or paternity. Application of a standard greater than preponderance of the evidence to paternity suits would serve the private interests affected by such suits, would protect against erroneous determinations of paternity, and would promote the interests of Government. Adoption of a standard greater than preponderance of the evidence would also be in accord with this Court's decisions, which have held that a preponderance standard is inadequate when applied to a proceeding to terminate a parent-child relationship, and which have recognized that the creation of a parent-child relationship should be subject to the same procedural fairness as the termination of such a relationship. In addition, a determination by this Court that a standard greater than preponderance of the evidence must be applied to actions to prove paternity would resolve a conflict among the courts as to the appropriate standard of proof in paternity suits.

CONCLUSION

For the reasons discussed above, it is respectfully submitted that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SESSIONS, FISHMAN, ROSENSON,
BOISFONTAINE, NATHAN & WINN
ROBERT C. LOWE (Trial Attorney)
TERENCE L. HAUVER
REUBEN I. FRIEDMAN
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601 Poydras Street
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Telephone: (504) 581-5055

BY: Reuben I. Friedman
Counsel for Appellant

June 13th, 1985

PROOF OF SERVICE CERTIFICATE

I, Reuben I. Friedman, one of counsel of record for Paul Joseph Galuszka, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of June, 1985, I served three copies of the Jurisdictional Statement in this case on Jeanne Nelson Schwab, Appellee herein, by mailing said copies in a duly addressed envelope, with first class postage prepaid, to John R. Martzell, Esq., counsel of record for said Jeanne Nelson Schwab, located at 338 Lafayette Street, New Orleans, La. 70130.

Reuben I. Friedman

Attorney for Paul Joseph Galuszka

APPENDIX A

REPORT OF THE COMMISSIONER AND JUDGE AD HOC

CIVIL DISTRICT COURT FOR THE PARISH OF
ORLEANS, STATE OF LOUISIANA
DIVISION "F" (S)
NO. 81-15896
DOCKET NO. 5

JEANNE NELSON SCHWAB, for and on behalf of
the minor, BRIAN PAUL SCHWAB

VERSUS

PAUL JOSEPH GALUSZKA

REPORT OF THE COMMISSIONER AND JUDGE AD HOC

STATEMENT OF THE CASE

Filed July 14, 1983

Jeanne Nelson Schwab sued Paul Joseph Galuszka seeking to establish the paternity of the minor child, Brian Paul Schwab, who was born on March 8, 1981.

The petition alleges that the defendant and the plaintiff had engaged in sexual relations over a period of time commencing in November of 1979 and concluding June 12, 1980. The petition further alleges that the defendant was the only man with whom the plaintiff had such relations during that interval of time. It further alleges that in mid-July of 1980, upon learning of her pregnancy that the defendant was notified and that he advised an abortion. The petition asks for the recognition of paternity and for child support.

The defendant filed an answer in which he denied the paternity and the sexual relations during the time alleged, denied that he was notified, or that he advised an abortion. He affirmatively alleged that the child was not his son and prayed for dismissal.

During the discovery process which followed the defendant resisted but was compelled, after writs were issued by the Court of Appeal, to submit to a blood grouping test. Further blood testing was suggested by the doctor who had performed the original tests. Additional testing was ordered but the defendant refused to comply.

The record is also replete with extensive pleadings with respect to discovery.

At the trial before the Commissioner and Judge ad Hoc the issue of paternity was the only one heard. The issue of support was deferred.

FACTS AND OPINION

Both the plaintiff and defendant are well educated, professional people. The plaintiff is a court reporter and the defendant is an attorney. Both parties were married previously and the marriages have ended in divorce. The plaintiff testified that commencing in November of 1980 she and the defendant met in various places and engaged in sexual activities for several months. The plaintiff testified that she knitted an afghan for the defendant and presented such to him. There is some question, although not dispositive of the litigation before the Court, as to whether the sexual activity continued through the months of March, April and May of 1980.

The plaintiff testified that she went to the defendant's

apartment in early June of 1980 where sexual activities took place on two separate occasions. Early in July when she missed a menstrual period she consulted a physician, who advised that she was pregnant. She confronted the defendant with this fact and several conversations ensued during which the possibility of abortion was advocated by the defendant. She denied any sexual activities with any other men during the time from November on. The plaintiff asserted her love for the defendant.

The defendant testified, and admitted the earlier sexual activities, and one of the two last occasions. The one he agrees took place, he states, took place in May. The dates are of critical importance.

His certainty in regard to the date, he testified, was strengthened because he had a rental car on hand at the time. His own car had been involved in an accident. In further support he introduced an estimate of repairs dated May 30, 1980, which he said were performed and paid for on that date. He testified that he would have returned the rental car immediately thereafter, and, therefore when the sexual encounter had taken place, it was in May. The Court doubts that the estimate was made, the repairs made, and the vehicle returned to the defendant all on the same day. The items repaired reflect extensive damage to the automobile. It is therefore altogether reasonable that the rental car testified to by the plaintiff, and the use of which was admitted by the defendant, took place well into the month of June.

In any event, it is the payment of estimate-invoice that would form the apex from which the critical chronology flows, and the defendant is in possession of evidence of payment, having paid by check. He did not produce any corroborating evidence of such payment other than his

testimony. It is he who holds possession of his cancelled checks and bank statement which he has chosen not to produce.

Another facet relating to the date was offered. The plaintiff testified that she recommended the employment of the defendant as an attorney. She testified that it was shortly following such recommendation that the two June encounters were had. The pleadings filed on such claim by the defendant allege that the accident took place June 1, 1980. The plaintiff showed that she was completely familiar with the facts of this accident. There is no reason to believe that the plaintiff and the defendant would be similarly informed about the facts of this accident in June, if there was no meetings between plaintiff and defendant, as testified by the defendant, in June, unless the testimony of the plaintiff is true. The plaintiff's motive in making the recommendation was very likely to further strengthen the relationship which she viewed to be based upon her love for the defendant. Her motives can be disregarded, but the dates of the accident and the subsequent recommendation are revealing when the facts in regard to the following dates are viewed.

The defendant admits that he was informed of the plaintiff's pregnancy in July and that he engaged in several conversations with the plaintiff, counselling her to obtain an abortion. He stated that he never acknowledged that it was his sexual participation that caused the plaintiff's pregnancy because he didn't know for sure.

The plaintiff, on missing her next menstrual period, contacted a physician. The physician, on receiving information concerning the plaintiff's menstrual cycle, and on observation of the baby as a slightly longer than full term delivery, places the probable date of conception in the first week of June.

There is no evidence that the plaintiff gave any information to the attending physician or to the hospital with respect to the paternity of the child. She did disclose the paternity in a subsequent baptismal ceremony. The plaintiff's confrontation of the defendant himself with the fact of her pregnancy renders the disclosures, or lack thereof, surrounding the birth itself of inconsequential probity.

The blood tests ordered revealed that in fertile males on the North American continent the compatibility of blood types indicates a 91.7% exclusion, that the defendant's compatibility is not within this exclusion and would fall, consequently, into the possible inclusive males whose blood would be compatible. Such tests are scientific and can exclude possible paternity by great percentages of possible fathers. Expressed in gambling terms, the plaintiff's chances of accusing the defendant and knowing nothing of his blood type are 11 to 1 against her to reach a compatibility found in the blood tests made.

The defendant was ordered to take further blood testing which may have excluded him. He refused to submit to such tests and the inference can be made that these new blood tests would not have excluded the defendant. The defendant's pleadings affirmatively alleged that he was not the father. He has offered no explanation to the Court, why, if he were indeed not the father, he would not welcome an opportunity to be scientifically excluded as the father.

The defendant seems to rest his case on the inability of perfect scientific proof that it was his sperm cell that caused the pregnancy. He has not acknowledged paternity.

At the trial the Court permitted evidence of sexual activities of the plaintiff with other men. Two other parties were subpoenaed who testified that they had had intercourse

with the plaintiff on one occasion each during a period of time two or three years prior to the birth of the child. This showing does not rise to any more than an indication of normal human sexual activity, and cannot be equated with a female of "dissolute manners", as formerly looked to by the Court as an indication of unreliability. Despite extensive discovery, no other men were disclosed, not only during the time frame of conception, but during the entire time of the affair.

There was nothing in the testimony of the plaintiff that was lacking in truthfulness or candor despite the embarrassing circumstances in which she finds herself. The defendant's suggestion that the entire affair was the plaintiff's idea, which seems to be the case, offers him no help when the issue of paternity is weighed by the Court, and ordinary standards of evidence-preponderance of the evidence - are applied.

It is therefore recommended that Paul Joseph Galuszka be adjudged the father of the minor child, Brian Paul Schwab, and all such other rights reserved to such minor in view of this finding.

It would be hoped that the defendant's attitude toward his son would change and the fact of the matter accepted by him. The burdens of having a son are many times overwhelmingly overcome by the pride in the relationship and the joy of having an heir.

July 14, 1983

Respectfully submitted,
/s/ John M. Holahan
JOHN M. HOLAHAN
COMMISSIONER AND JUDGE
AD HOC

APPENDIX B

JUDGMENT OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA
DIVISION "E"

NO. 81-15896
DOCKET NO. 5

JEANNE NELSON SCHWAB,
FOR AND ON BEHALF OF THE MINOR,
BRIAN PAUL SCHWAB

VERSUS

PAUL JOSEPH GALUSZKA

JUDGMENT

This matter came for hearing on November 2, 1983 on the opposition and exceptions by the defendant, Paul Joseph Galuszka to the findings of the Commissioner and Judge Ad Hoc.

PRESENT: John R. Martzell, Attorney for Jeanne Nelson Schwab
Robert C. Lowe, Attorney for Paul Joseph Galuszka

After reading the record, hearing the evidence and arguments urged, the Court hereby adopts the recommendation of the Commissioner. Therefore:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Jeanne Nelson Schwab and against Paul Joseph Galuszka decreeing that Paul Joseph Galuszka is the father of the minor, Brian Paul Schwab.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all such rights and remedies arising from the foregoing be and are hereby reserved to the minor, Brian Paul Schwab.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT ON this 6th day of January, 1984.

/s/ Henry J. Roberts, Jr.,
JUDGE

APPENDIX C

JUDGMENT OF THE LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

NO. CA-2084
COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

JEANNE NELSON SCHWAB,
for and on Behalf of the
Minor, BRIAN PAUL SCHWAB

VERSUS

PAUL JOSEPH GALUSZKA

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 81-15896, DIVISION "F" (S)
HONORABLE HENRY J. ROBERTS, JR., JUDGE

ROBERT L. LOBRANO
JUDGE

(Court composed of Judges Jim Garrison, Denis A. Barry and Robert L. Lobrano)

Filed Jan 11, 1985

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New Orleans, La. 70130
FOR APPELLANT

JOHN R. MARTZELL
338 Lafayette Street
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FOR APPELLEE

AFFIRMED

This paternity action is brought by Jeanne Nelson Schwab on behalf of her minor son, Brian Paul Schwab (appellee) seeking to have Paul J. Galuszka, (appellant) declared the natural father of the child. From a judgment of the lower court declaring him to be the father appellant perfects this appeal alleging errors as to law and fact.

The issues presented for our review can be consolidated into two categories for discussion. First, appellant argues that the burden of proof should be greater than a mere preponderance of the evidence, but should be "clear and convincing". Or, as he further argues, it should be a preponderance of the facts. Second, he argues that the record does not support the findings of fact set forth by the commissioner, and that appellee failed in her burden of proof.

BURDEN OF PROOF

The pertinent dates to be considered in connection with the first issue are as follows. The date of conception is sometime between June 4th and June 12th, 1980. The date of birth is March 8, 1981. The trial dates are May 9 and 10, 1983.

At the time of conception Civil Code Articles 208 thru 212 provided as follows:

> "Art. 208. Illegitimate children, who have not been legally acknowledged, may be allowed to prove their paternal descent."
>
> "Art. 209. In the case where the proof of paternal descent is authorized by the preceding Article, the proof may be made in either of the following ways:

1. By all kinds of private writings, in which the father may have acknowledged the bastard as his child, or may have called him so;

2. When the father, either in public or in private, has acknowledged him as his child, or has called him so in conversation or has caused him to be educated as such;

3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived."

"Art. 210. The oath of the mother, supported by proof of the cohabitation of the reputed father with her, out of his house, is not sufficient to establish natural paternal descent, if the mother be known as a woman of dissolute manners, or as having had an unlawful connection with one or more men (other than the man whom she declares to be the father of the child) either before or since the birth of the child."

"Art. 211. In the case of rape, whenever the time of such rape shall agree with the time of conception, the ravisher may, at the suit of the parties concerned, be declared to be the father of the child."

"Art. 212. Illegitimate children of every description may make proof of their maternal descent, provided the mother be not a married woman.

> But the child who will make such proof shall be bound to show that he is identically the same person as the child whom the mother brought forth."

Subsequent to conception, but prior to birth, Articles 208 and 209 were amended to provide:

> "Art. 208. Authorization to prove filiation. Illegitimate children, who have not been acknowledged as provided in Article 203, may be allowed to prove their filiation."

> "Art. 209. Methods of proving filiation.
>
> . . . 4. A child of a man may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgement in a testament, that he is the child of that man. Evidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time the child was conceived creates a rebuttable presumption of affiliation between the child and the alleged father."

Subsequent to birth, but prior to trial they were again amended to provide:

> "Art. 208. Requirement to prove filiation. In order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must institute a

proceeding under Article 209."

> "Art. 209. Proof of filiation.
>
> A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article."

* * *

At the time of trial, Article 209 had again been amended to provide:

> "Art. 209. Proof of filiation.
>
> A. A child not entitled to legitimate filiation or filiated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or in his behalf within the time limit provided in this article."

Appellant first argues that the applicable codal provisions should be those in effect at the time of conception. In applying these he argues that appellee failed to prove any of the three provisions set forth in Article 209. In addition, he argues that the legislative history of the pertinent civil code articles indicates an intent to establish a burden of proof greater than a mere preponderance of the evidence. In this regard he analogizes the paternity action with the disavowal

action set forth in Civil Code Article 187 as construed in *Mock v. Mock*, 411 So.2d 1063 (La. 1982).

Civil Code Article 187 provides:

> "The husband can disavow paternity if he proves by a preponderance of the evidence any facts which reasonably indicate he is not the father."

In interpreting this article the Supreme Court, in *Mock v. Mock*, supra, stated:

> "However, the article's reference is to the proof of non-paternity by reasonably indicative *facts*, by a preponderance of the evidence. The burden is thus couched differently than a simple preponderance of the evidence."
>
> * * *
>
> ". . . The legislature intended a different type of burden, that the husband could only rebut the paternity presumption by proof by a preponderance of the evidence of facts which indicate that he is not the father of the child." *Id. at 1066.*

Appellant argues that since the burden is greater in a disavowal action it should also be the same in a paternity action.

We disagree with appellant on both of these arguments. We find that the applicable law governing the burden of

proof is as set forth in the applicable articles as of the date of trial. Civil Code Article 209, as amended, did not create a new substantive right as there always existed a right to prove paternity. The amendments merely expanded the evidentiary methods by which paternity could be proved. Even if, assuming arguendo, the date of conception rather than the date of trial were to be used as the pivotal date we are of the opinion the provisions of Article 209 as amended, would still be applicable. *State v. Essex*, 427 So.2d 71 (La. App. 4th Cir. 1983), writ denied, made it clear that, at least in this circuit, the amendments to Civil Code Article 209 are procedural and are therefore to be applied retroactively. Although admitting that a conflict exists with other circuits, the court in *Essex*, supra, stated ". . . it is clear to us that the articles relate to evidentiary matters that are procedural in nature and should therefore have retroactive effect." *Id. at 74.* We therefore hold that it was proper for the lower court to apply the provisions of Article 209, as amended, in disposing of this case.

We also reject appellant's argument concerning the burden of proof. Civil Code Article 209 is clear. It states ". . . by a preponderance of the evidence in a civil proceeding. . ." This is the standard we applied in *State v. Essex*, supra, and in *O'Bannon v. Azar*, 435 So.2d 1144 (La. App. 4th Cir. 1983). Citing the earlier case of *Succession of Washington*, 308 So.2d 892 (La. App. 2nd Cir. 1975), we stated in *O'Bannon*, supra, "[t]he burden of proof required by plaintiff is to establish paternity by a preponderance of the evidence." *Id. at 1148.* Thus, we are satisfied that the burden of proof both before and after the above cited amendments to the Civil Code is by a preponderance of the evidence.

Appellant's reliance on the analogy with the disavowal action of Article 187, and *Mock v. Mock*, supra, is misplaced.

In so arguing he overlooks the provisions of Article 184, as amended by Act. No. 430 of 1976, which provides:

> "The husband of the mother is presumed to be the father of all children born or conceived during the marriage."

In *Mock v. Mock*, supra, the Supreme Court states, "[t]he presumption created by this provision has been referred to as 'the strongest presumption known in law' " *Id. at 1064*. That Court's subsequent discussion of the burden of proof in disavowal suits was predicated on the existence of this presumption. The existence of that presumption cannot be ignored when attempting analogy with the paternity suit. Although appellant orally argues otherwise there is no presumption in a paternity suit. The scales of justice stand out evenly in a paternity action and the plaintiff bears the burden by a preponderance as in any other civil proceeding.

Having determined the applicable Civil Code Article and the burden of proof required we now turn to a review of the facts of this case.

FACTS:

Both parties testified that commencing in November of 1979 they met in various places and engaged in sexual activities for several months. They both are employed in the legal profession, appellee is a court reporter, appellant as an attorney.

Appellee testified that she went to appellant's apartment in early June of 1980, where sexual activities took place on two separate occasions, June 4th and June 12th. Early

in July, when she missed a menstrual period, she consulted a physician, who advised her that she was pregnant. Upon learning of her pregnancy, she testified she met with appellant to discuss the situation. Several conversations ensued during which the appellant admitted paternity and advocated an abortion. Once appellee decided that she was not going to have an abortion, she testified appellant became hostile, denied paternity and told her that any further communications would have to be through his attorney.

Appellant admits that he was informed of appellee's pregnancy in July and that he engaged in several conversations with her advising her to obtain an abortion. He, however vehemently denies having admitted paternity, and states he merely consulted with her in an advisory capacity.

Appellee asserted her love for appellant and denied any sexual activities with any other man from November of 1979.

Appellant testified and admitted the earlier sexual activities, and one of the two last occasions. However the one he agrees took place, he states took place in late May, not June. Further, he testified that sexual activity occured on that occasion, but he did not complete the sexual act because appellee was drunk. The dates are of critical importance since if appellant's version is true then he could not have been the father of the child. If on the other hand, appellee's version is accepted that sexual intercourse occurred in early June, then appellee could have been Brian's father.

Appellant's certainty in regard to the date stems from his assertion that he had a rental car on hand at the time as his own car had been involved in an accident and that rental car was returned at the end of May. In further support he

introduced an estimate of repairs dated May 30, 1980, which he said were performed and paid for on that date. He testified that he would have returned the rental car immediately thereafter, and therefore when the sexual encounter had taken place, it was in May.

Another disputed fact concerning the date issue was appellee's testimony that shortly following her recommendation of appellant as an attorney for parties involved in an accident case, the two June encounters were had. The pleadings of that referred to accident case show that the date of the accident was June 1, 1980. Appellee's testimony shows a complete familiarity with the facts of that case indicating that there were meetings between the parties about that time. Appellant denies intercourse with appellee during the week of June 4th and June 12th but does admit to sexual intercourse following her referral of a case.

On both of these factual issues concerning the dates the Commissioner found it more probable than not that appellee's version was the more accurate. He expressed doubt that the estimate to appellant's car, the repairs and payment were all made on the same date. His conclusions in this regard were predicated on the fact that the estimate was for extensive damages requiring 13 hours of labor, and that actual payment of the damages would be more conclusive. Appellant submitted no proof of payment.

Further, appellee's familiarity with the case referred to appellant, the accident date in that case, and that fact that appellant represented the parties therein led the commissioner to believe appellee's version in that regard.

In both instances we cannot say there was manifest error in the lower court's findings.

The scientific evidence presented consisted of blood grouping tests performed by Dr. Leslie Bryant, Jr., an acknowledged expert in the field. Those studies revealed that the appellant was not excluded from the possibility of being the child's father, but rather showed a probability of 91.7%. That is, according to Dr. Bryant, it is 91.7% more probable that the appellant is the child's biological father than the random man in the population.

Appellant argues that the blood tests are inadmissable and are to be discredited since they were partially performed and interpreted by Dr. Bryant's technical staff. In essence, he urges a break in the "chain of custody".

La. R. S. 9:396 provides:

> "Notwithstanding any other provision of law to the contrary, in any civil action in which paternity is a relevant fact, or in an action en desaveu, the court, upon its own initiative or upon request made by or on behalf of a person whose blood is invlived may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require."

La. R. S. 9:397 provides:

> "The tests shall be made by experts qualified

> as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court."

Appellant supports his "chain of custody" arguments with citation of criminal cases. Clearly the purpose of the chain of custody evidentiary rule is to prevent evidence from being tampered with, or being lost, etc. In this civil proceeding, the above cited statutes are intended to provide the court with scientific evidence, to be reviewed and considered with the other evidence in reaching a decision. First we do not agree that there was a so-called "break" in the chain of custody. The tests were performed under the supervision of Dr. Bryant, and were conducted by technical staff. We find no evidence that they were not performed in accordance with standard practices. Further appellant's argument goes to the weight of the scientific evidence rather than its admissability.

Factually appellant argues that the failure of appellee to call her sister as a corroborating witness to certain facts when her sister was present in the courtroom mandates that there be a presumption in his favor that the facts were not true. We agree to a certain extent in this regard. The failure of a corroborating witness to testify when available does create a presumption that his testimony would be adverse. However,

it is merely one factor that must be weighed along with the other evidence. In this same regard we note that appellant failed to produce evidence of payment of his car damages in order to establish a precise date. He also failed to submit to another blood test, even when ordered to do so by the lower court. These factors, although standing alone are inconclusive, are to be considered with the other evidence presented. Standing alone, perhaps these instances on the part of both parties kept the scales of justice balanced.

Appellant finally argues that, even assuming there was sexual intercourse between the parties on June 4, 1980 appellee failed to prove that that date was the date of conception. The testimony of medical experts is somewhat contradictory on this issue. Dr. LeBoeuf stated that assuming appellee's last menstrual cycle began May 23, 1980, and that the child was a post term baby, a June 4th or June 12th conception date was altogether possible. Dr. Wiedeman testified, "I don't think you can pin down any conception date because it's such an inexact science and its a pure estimate."

We conclude that the evidence of the exact conception date is another factor to be considered along with the other evidence submitted.

After review of all the evidence, applying the applicable standard of proof, we cannot say that the lower court was clearly wrong in its determination that appellant is the natural father of the minor, Brian Paul Schwab. All costs to be borne by appellant.

AFFIRMED.

APPENDIX D

DENIAL BY LOUISIANA SUPREME COURT OF APPELLANT'S APPLICATION FOR WRIT OF CERTIORARI AND/OR REVIEW

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 85-C-0354

JEANNE NELSON SCHWAB FOR
AND ON BEHALF OF THE MINOR,
BRIAN PAUL SCHWAB

VS.

PAUL JOSEPH GALUSZKA

IN RE: Galuszka, Paul Joseph; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number CA-2084; Parish of Orleans Civil District Court Div. "F" Number 81-15896.

March 15, 1985

WFM
JAD
PFC
JLD
FAB
JCW

Denied.
Supreme Court of Louisiana
March 15, 1985

/s/ Frans J. Labranche
Clerk of Court For the Court

APPENDIX E

NOTICES OF APPEAL

SUPREME COURT OF LOUISIANA
STATE OF LOUISIANA

JEANNE NELSON SCHWAB,
FOR AND ON BEHALF OF THE MINOR,
BRIAN PAUL SCHWAB,

Appellee

versus

PAUL JOSEPH GALUSZKA,

Appellant

NO. 85-C-0354

Filed May 14, 1985

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul Joseph Galuszka, the Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Louisiana Civil District Court for the Parish of Orleans, dated January 6, 1984, decreeing that Appellant is the father of the minor, Brian Paul Schwab, from the judgment of the Louisiana Court of Appeal for the Fourth Circuit, dated January 11, 1985, which affirmed the judgment of the Civil District Court, and from the Louisiana Supreme Court's denial on March 15, 1985, of Appellant's application for Writ of Certiorari and/or Review.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SESSIONS, FISHMAN, ROSENSON, BOISFONTAINE, NATHAN & WINN
ROBERT C. LOWE (Trial Attorney)
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Telephone: (504) 581-5055

/s/ ROBERT C. LOWE
Attorney for Paul J. Galuszka

PROOF OF SERVICE CERTIFICATE

I, Robert C. Lowe, one of counsel of record for Paul Joseph Galuszka, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of May, 1985, I served a copy of the Notice of Appeal to the Supreme Court of the United States on Jeanne Nelson Schwab, Appellee herein, by mailing said copy in a duly addressed envelope, with first-class postage prepaid, to John R. Martzell, Esq., counsel of record for said Jeanne Nelson Schwab, located at 338 Lafayette Street, New Orleans, La. 70130.

/s/ ROBERT C. LOWE
Attorney for Paul Joseph Galuszka

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. CA-2084

JEANNE NELSON SCHWAB,
FOR AND ON BEHALF OF THE MINOR,
BRIAN PAUL SCHWAB,

Appellee

versus

PAUL JOSEPH GALUSZKA,

Appellant

Filed May 14, 1985

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul Joseph Galuszka, the Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Louisiana Civil District Court for the Parish of Orleans, dated January 6, 1984, decreeing that Appellant is the father of the minor, Brian Paul Schwab, from the judgment of the Louisiana Court of Appeal for the Fourth Circuit, dated January 11, 1985, which affirmed the judgment of the Civil District Court, and from the Louisiana Supreme Court's denial on March 15, 1985, of Appellant's application for Writ of Certiorari and/or Review.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SESSIONS, FISHMAN, ROSENSON, BOISFONTAINE, NATHAN & WINN
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/s/ ROBERT C. LOWE
Attorney for Paul J. Galuszka

PROOF OF SERVICE CERTIFICATE

I, Robert C. Lowe, one of counsel of record for Paul Joseph Galuszka, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of May, 1985, I served a copy of the Notice of Appeal to the Supreme Court of the United States on Jeanne Nelson Schwab, Appellee herein, by mailing said copy in a duly addressed envelope, with first-class postage prepaid, to John R. Martzell, Esq., counsel of record for said Jeanne Nelson Schwab, located at 338 Lafayette Street, New Orleans, La. 70130.

/s/ ROBERT C. LOWE
Attorney for Paul Joseph Galuszka

CIVIL DISTRICT COURT FOR THE PARISH OF
ORLEANS, STATE OF LOUISIANA
DIVISION "F" (S)
NO. 81-15896

JEANNE NELSON SCHWAB,
FOR AND ON BEHALF OF THE MINOR,
BRIAN PAUL SCHWAB,

Appellee

versus

PAUL JOSEPH GALUSZKA,

Appellant

FILED _____ _____
DEPUTY CLERK

Filed May 14, 1985

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul Joseph Galuszka, the Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Louisiana Civil District Court for the Parish of Orleans, dated January 6, 1984, decreeing that Appellant is the father of the minor, Brian Paul Schwab, from the judgment of the Louisiana Court of Appeal for the Fourth Circuit, dated January 11, 1985, which affirmed the judgment of the Civil District Court, and from the Louisiana Supreme Court's denial on March 15, 1985, of Appellant's application for Writ of Certiorari and/or Review.

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/s/ ROBERT C. LOWE
Attorney for Paul Joseph Galuszka

APPENDIX F

OPINION HOLDING THAT DUE PROCESS REQUIRES BURDEN OF PROOF GREATER THAN PREPONDERANCE OF THE EVIDENCE IN PATERNITY SUIT

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS DIVISION

NO. 1435 of 1983

Paternity

JEAN MARIE MINNICH

VS

GREGORY L. RIVERA

BEFORE MUELLER, J., HUMMER, J. and PEREZOUS, J.

OPINION

BY MUELLER, J.

Presently before the Court is the motion for new trial filed by Defendant, Gregory L. Rivera.

On June 17, 1983, Plaintiff, Jean Marie Minnich, filed a Complaint seeking support for Cory Michael Minnich from Defendant, Gregory L. Rivera, the alleged father of her son. Defendant denied paternity, and a trial was held before a jury on April 24, 1984. The jury found in favor of Plaintiff

and determined that Defendant is the father of Cory Michael Minnich. Post-trial motions were filed on May 3, 1984. Briefs having been filed by both parties and oral argument having been heard by the Court en banc on September 26, 1984, these motions are properly before the Court for disposition.[1]

During the trial, Plaintiff claimed that she had sexual relations with Defendant on two or three occasions, but the testimony described only one incident which occurred in the late summer of 1982. This episode took place in the back of a parked van with Defendant's brother, Christopher Rivera, and Plaintiff's sister, Mary Minnich, also present in the van. (N.T. 24, 31-32). Plaintiff denied engaging in sexual relations with anyone other than Defendant during the possible conception period of the child, who was born on May 28, 1983. (N.T. 25).

Defendant first argues that Christopher Rivera, Defendant's brother, should have been presented to the jury standing beside Plaintiff and her child after a foundation had been laid as to Christopher being the possible father of the child. This foundation according to Defendant consisted of testimony by Christopher Rivera that he violated an Order of this Court dated April 16, 1984 by refusing to submit to HLA blood tests and Defendant's testimony that Plaintiff wanted to have sexual intercourse with Christopher and that she was alone with him in the back of the van for a short

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1 Defendant's attorney gave notice to the Attorney General of Pennsylvania pursuant to Pa. R.C.P. 235, and no appearance was entered by the Attorney General. *See*: Letter dated May 22, 1984 attached to Defendant's attorney's affidavit of service filed August 9, 1984.

period of time. (N.T. 51, 52, 59-61).[2]

In his testimony, Defendant admitted having sexual relations with Plaintiff on the night in question, and also stated that no one else had sex with Plaintiff. Defendant did testify that at one point Christopher and Plaintiff were alone in the back of the van for approximately five to ten minutes. Defendant acknowledged that he could not definitely say that the two of them had engaged in sexual intercourse. (N.T. 59-61). Plaintiff denied sexual relations with anyone other than Defendant during the relevant period of conception, and she specifically denied having sex with Christopher on the same night she had sex with Defendant. (N. T. 32-33). Plaintiff's sister, Mary Minnich, who was also present in the van that night, stated that nothing occurred between Plaintiff and Defendant's brother in the back of the van. (N.T. 45).

Defendant claims he was harmed because the jury was prevented from considering relevant and material evidence in the form of Christopher Rivera standing beside Plaintiff and her child. The Court disagrees. A proper foundation for the introduction of this evidence was not established. No witness, including Defendant himself, offered any testimony that Plaintiff had engaged in sexual intercourse with Christopher Rivera. In view of this, the Court properly excluded the presentation of this evidence to the jury.

Defendant next contends that the jury should have been instructed as to the legal effect of a determination by them

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2 After the pretrial conference held April 12, 1984, Defendant's attorney filed a supplemental pretrial memorandum on April 13, 1984 listing two additional witnesses. This memorandum stated: "A. Chris Rivera, brother of Gregory Rivera, will testify that he had sexual relations with the Plaintiff on the same night in which Gregory Rivera had sex with her."

that Christopher Rivera and Plaintiff had indeed engaged in sexual intercourse during the time of possible conception. Defendant asserts that sufficient evidence, even without the presentation to the jury of Christopher beside Plaintiff and her child, existed to allow the jury to consider whether Plaintiff had sexual relations with Christopher Rivera.

The Court finds this argument totally devoid of merit. As discussed earlier, no evidence was presented at trial from which the jury could conclude that Plaintiff had sex with anyone other than Defendant. Accordingly, it was not error for the Court to refuse Defendant's request for a charge to the jury concerning the legal effect of Plaintiff having had sexual relations with anyone other than Defendant.

The procedure governing the commencement of support actions in Pennsylvania is set forth at 42 Pa. C.S.A. §6704.[3] Section 6704(g) states that at a trial for paternity "[t]he burden of proof shall be by a preponderance of the evidence." At the close of the testimony at the trial, Defendant's request that the burden of proof be set at a "clear and convincing evidence" standard was denied.

Defendant's final argument is that the due process requirements of both the United States Constitution and the Pennsylvania Constitution mandate that a determination of paternity be made using a clear and convincing standard of proof, rather than a mere preponderance of the evidence standard.

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3 Act of April 28, 1978, P.L. 202, No. 53, §10(88), as amended, Act of October 5, 1980, P.L. 693, No. 42, §207(a). Subsections (a) to (d) of 42 Pa. C.S.A. §6704, insofar as they apply to the practice and procedure in an action for support, have been superceded. Pa. R.C.P. 1910.31(4).

The analysis of Defendant's argument must begin with the strong presumption of constitutionality of an Act of the General Assembly and the heavy burden of persuasion upon one who challenges the constitutionality of a statute. *Snider v. Thornburgh*, 496 Pa. 159, 166 (1981). As such, unless a legislative enactment "clearly, palpably and plainly" violates the constitution, it will not be declared unconstitutional. *Snider*, supra; *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 16 (1975); *Daly v. Hemphill*, 411 Pa. 263, 271 (1963).

The Fourteenth Amendment to the United States Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty or property, without due process of law."[4] Due process is not a static, rigid concept, but is flexible and calls for such procedural protections as the situation warrants to ensure fundamental fairness. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

This is a case of first impression in this Commonwealth, so this Court is without guidance in determining whether due process is violated when an adjudication of paternity is made using a preponderance of the evidence standard of proof as stated in the statute. This Court believes that the creation of a parent-child relationship is an example of the kind of situation which warrants a flexible application of due process.

In Pennsylvania, paternity actions were once governed by

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4 Although Defendant's brief raises a due process claim under the Pennsylvania Constitution, it appears to rely only on the Federal Constitution. Accordingly, the Court's analysis of the burden of proof issue presented will focus on federal law only.

criminal law.[5] A defendant contesting paternity had the choice of proceeding in a civil action using a preponderance of the evidence standard or proceeding in a criminal action employing a beyond a reasonable doubt standard.[6] This choice was removed, however, when the Pennsylvania Legislature decided that all determinations of paternity would be civil actions and the burden of proof would be by a preponderance of the evidence. 42 Pa. C.S.A. §6704(g). The civil/criminal distinction is of no importance in determining what standard of proof is constitutionally required. That distinction has been discarded, and the focus is now on the nature of the threatened deprivation. *See: In re Gault*, 387 U.S. 1 (1967).

Resolution of the issue of whether the preponderance of the evidence standard of proof in a paternity action is constitutionally sufficient requires analysis of the governmental and private interests affected in this adjudication. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the United States Supreme Court outlined three distinct factors to be balanced when identifying the specific requirements of due process. These factors are:

> ". . . first, the private interest that will be affected by the official action; second, the

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5 *See:* Wilful separation or non-support, 18 P.S. §4731, Act of June 24, 1939, P.L. 872, §731, Act of July 5, 1957, P.L. 481, §1; Neglect to support a bastard, 18 Pa. C.S.A. §4323, Act of December 6, 1972, P.L. No. 1482, No. 334, §1.

6 Act of July 13, 1953, P.L. 431, as amended, Act of August 14, 1963, P.L. 872, 62 P.S. §2043.31 *et seq. See: Commonwealth ex rel. Johnson v. Peake*, 272 Pa. Super. 340 (1979); *Armstrong v. Dandridge*; 257 Pa. Super. 415, *Commonwealth v. Dillworth*, 431 Pa. 479 (1968).

> risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 424 U.S. at 335.

The first factor - the private interests of a defendant in a paternity action - weighs heavily in favor of the higher standard of proof of clear and convincing evidence. Clearly, a defendant's familial interests are affected by a paternity determination. A parent's right to "the companionship, care, custody and management of his or her children" has been held to be an important protectible interest. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27 (1981), quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Because that interest is so substantial, the Supreme Court in *Lassiter* held that "a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one". *Lassiter*, 452 U.S. at 27.

The creation of a parent-child relationship involves important and protectible familial interests just as the termination of a parent-child relationship does. The imposition of parental obligations demands procedural fairness. The United States Supreme Court recognized this in *Little v. Streater*, 452 U.S. 1 (1981), when it held that due process requires that a state must provide indigent putative fathers with blood tests where the statute required that the costs of such tests be charged against the requesting party. The protectible interests of the putative father in a paternity action were also acknowledged by the Pennsylvania Superior Court

when it held in *Corra v. Coll*, 305 Pa. Super. 179 (1982), that indigent defendants in a civil paternity action have a due process right to appointed counsel.

A putative father contesting paternity also has significant liberty interests at stake. Once paternity is established *res judicata* applies, and this finding cannot be relitigated. *Norris v. Beck*, 282 Pa. Super. 420 (1980). A putative father's physical liberty may also be in jeopardy. If paternity is established and a support order is entered, a defendant who willfully refuses to comply with this order, when he has the financial resources to do so, faces possible incarceration. 18 Pa. C.S.A. §4324 (up to 90 days imprisonment).

In addition, a defendant found to be a father has property interests that will be affected. The wages, salary or commissions of a person owing support may be attached. Pa. R.C.P. 1910.22. Children born out of wedlock may have rights to their natural father's estate, 20 P.S. §§2107(d), 2514(8), 3538, 6114(5), and to his worker's compensation benefits, 77 P.S. §562.

These familial, liberty and property interests of a defendant in a civil paternity action are significant enough that they alone justify imposing a clear and convincing standard of proof. The Court still must evaluate the remaining two *Mathews* elements, however, to determine whether they shift the due process balance away from granting putative fathers this additional protection.

The next factor to be considered is the risk that a paternity adjudication with a burden of proof of by a preponderance of the evidence will lead to an erroneous determination of paternity. In paternity hearings, numerous factors combine to increase the risk of erroneous factfinding. In these

trials, the testimony of a party is often of questionable reliability and there are seldom accurate or reliable eyewitnesses. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and may reduce the chance that an erroneous determination of paternity will occur. *See: Addington v. Texas*, 441 U.S. 418 (1979). In *Little*, supra, the Supreme Court found that access to blood tests by indigent putative fathers would help ensure that a correct decision would be reached. More recently, the Pennsylvania Superior Court in *Corra*, supra, found that access to blood tests was not enough protection against erroneous determinations and decided that counsel is needed to ensure that the defendant is informed of his right to request blood tests and to inform him of their significance. To require a clear and convincing standard of proof is even a better procedure for safeguarding against erroneous determinations of paternity.

Additional support for increasing the standard of proof applicable to paternity hearings can be found in other Pennsylvania statutory and decisional law. For example, for purposes of prescribing benefits for children born out of wedlock through their father, clear and convincing proof is required that the man was the father of the child. 48 P.S. §167(b)(3). Similarly, in order for a child born out of wedlock to have rights in his father's estate, there must be clear and convincing evidence of the father's paternity. 20 Pa. C. S. A. §2107(c)(3). In both of these situations, a prior court determination of paternity is sufficient to meet the clear and convincing standard. The resulting anomaly is that a paternity adjudication where the standard of proof was only by the preponderance of the evidence can then be used to satisfy the higher standard of proof necessary for proving paternity in these situations.

The clear and convincing standard of proof is employed in many different types of civil actions in Pennsylvania. Clear and convincing evidence is required to prove, among other things: title by adverse possession, *Stevenson v. Stine*, 412 Pa. 478 (1963); a claim for wages for personal service to a decedent, *Mooney's Estate*, 328 Pa. 273 (1937); fraud, *Gilberti v. Coraopolis Trust Company*, 342 Pa. 161 (1941); and facts necessary to overcome the presumption of a gift, *Butler v. Butler*, 464 Pa. 522 (1975).

The Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), reviewed New York's procedure for termination of parental rights and held that the preponderance of the evidence test violated due process. The Supreme Court stated that the intermediate standard of proof of clear and convincing evidence is mandated when the individual interests at stake are both "particularly important" and "more substantial than mere loss of money". 455 U.S. at 756. This Court believes that an adjudication of paternity is a situation demanding this intermediate standard of proof.

The final consideration is the government interest involved in a paternity action and the administrative and fiscal burdens a higher burden of proof would entail. The primary interest of the state is that a just and accurate decision be reached. *Lassiter*, supra, 452 U.S. at 27. Therefore, not only the putative father's interest but also the state's interest is best served when the determination of paternity is made under a clear and convincing standard, rather than by a mere preponderance of the evidence. Since an accurate determination of paternity increases the likelihood that the adjudged father will comply with his support obligations, the state's future administrative burdens will be lessened. The state will incur no added expense by the

imposition of the higher standard of proof at a paternity hearing; unlike, for example, a constitutional requirement of court-appointed counsel.

Our conclusion is that in paternity determination proceedings, the private interests affected are substantial; the risk of error from using a preponderance of the evidence standard is considerable; and the countervailing state interest favoring that standard is minimal. Accordingly, the Court finds that due process requires that the burden of proof at a paternity trial be by clear and convincing evidence and that Section 6704(g) is unconstitutional by requiring the burden of proof to be by a preponderance of the evidence.

ORDER

AND NOW, October 19, 1984, Defendant's Motion for a New Trial is granted. The Domestic Relations Office is directed to send a copy of this Opinion and Order to LeRoy S. Zimmerman, Attorney General of Pennsylvania, 16th Floor, Strawberry Square, Harrisburg, Pennsylvania 17120.

BY THE COURT:

/s/ Paul A. Mueller, Jr.
PAUL A. MUELLER, JR.
JUDGE

Copies to:
Mary Louise Barton, Assistant District Attorney William Watt Campbell, Esquire